APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Petitioner,*

v.

FEDERAL MARITIME BOARD and UNITED STATES OF AMERICA, *Respondents,*

and

PHILIP R. CONSOLO, *Intervenor.*

Reply of Respondents to Intervenor's Motion to Dismiss or Require a Bond

Intervenor, Philip R. Consolo (Consolo), has moved to dismiss the petition for review for lack of jurisdiction or alternatively to require petitioner to post a bond. Respondents United States and Federal Maritime Board (the Government) take the position that this Court has jurisdiction and therefore oppose so much of the motion as requests dismissal. As to the request for the bond, the Government believes that this is a matter primarily between the private parties to this litigation and that it would be inappropriate for the Government to comment on it.

On March 28, 1961, the Federal Maritime Board (the Board) entered an order directing Flota Mercante Grancolombiana (Flota), a common carrier by water in foreign commerce, to pay to Consolo, a banana importer, the sum of $143,370.98 as reparations for injury caused by Flota's violation of Sections 14 and 16 of the Shipping Act, 1916, as amended (46 U.S.C. 812, 815). On May 23, 1961, Consolo filed with this Court (No. 16,366) a petition for review of

that order requesting *inter alia* that this Court direct the Board to make a supplementary award of $426,111.69 in addition to the award of $143,370.98. On May 24, 1961, Flota filed with this Court (No. 16,369) its petition for review asking *inter alia* that this Court set aside the order making the award of $143,370.98. The Board's order of March 28 is thus the subject of cross-petitions for review. Both Consolo and Flota are dissatisfied with the reparation award, Consolo because it is smaller than the amount he believes himself entitled to, Flota because it believes Consolo is not entitled to any award at all.

Consolo's motion to dismiss for lack of jurisdiction is addressed solely to Flota's petition to review (No. 16,369). Consolo's theory is that while an order *denying* reparations is subject to review exclusively in a court of appeals under § 2 of the Judicial Review Act of 1950 (5 U.S.C. 1032), an order *granting* an award is subject to review solely in the district court under § 30 of the Shipping Act (46 U.S.C. 829). Thus, under Consolo's theory, the Board's order in the instant case, insofar as it denied Consolo the full amount claimed, is subject to review only in a court of appeals while insofar as it granted him a portion of the claimed amount is subject to review only in a district court. We believe that Consolo is mistaken and that the Board's order in both its aspects is subject to this Court's jurisdiction.

Flota's petition to have this Court determine the validity of and set aside the Board's order awarding Consolo reparations is based on Section 2 of the Judicial Review Act of 1950 (5 U.S.C. § 1032). That section provides that the several courts of appeals shall have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" such final orders of the Board as were previously "subject to judicial review pursuant to

the provisions of Section 31, Shipping Act, 1916 * * *."[1] Section 31 of the Shipping Act, 1916 (46 U.S.C. 830),[2] states that "except as otherwise provided" the procedure governing suits "to enforce, suspend, or set aside, in whole or in part, any order of the [Board]" shall be the same as in similar suits "in regard to orders of the Interstate Commerce Commission * * *."[3] The procedures for setting aside or modifying Interstate Commerce Commission orders by the district courts were established by the Urgent Deficiencies Act of 1913, 38 Stat. 208, 219-220. Thus, Board orders which prior to 1950 were reviewable under the procedures established by the Urgent Deficiencies Act were transferred by the Judicial Review Act to the jurisdiction

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[1] Section 2 of the Judicial Review Act of 1950, 64 Stat. 1129, 5 U.S.C. 1032, provides in pertinent part as follows:

> The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, * * * (c) such final orders of the * * * Federal Maritime Board * * * entered under authority of the Shipping Act, 1916, as amended, * * * as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended.

[2] Section 31 of the Shipping Act provides as follows:

> The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the [Board] shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

[3] The only exceptions expressed in the Shipping Act appear in Sections 29 and 30 (46 U.S.C. 828, 829), neither of which relates to suits to *set aside* Board orders. Section 29 provides for suits by the Attorney General to enjoin violations of Board orders. Section 30 provides for suits by private parties to enforce unsatisfied Board awards of reparations.

of the several courts of appeals. The issue here is whether an order granting reparations was an order thus reviewable.

The applicable review provision of the Urgent Deficiencies Act was incorporated in 28 U.S.C. (1946 ed.) § 41(28), the substance of which now appears in the Revised Code as 28 U.S.C. 1336 (See *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 432), and provides:

> "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Prior to the Supreme Court's decision in *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, it was thought that a reparation order, whether granting or denying reparations, was not an "order" subject to challenge under the Urgent Deficiencies Act. See the dissenting opinion in *United States* v. *Interstate Commerce Commission, supra.* In that case, however, which involved a suit by the United States in its proprietary capacity as a shipper to set aside an order of the Commission denying it reparations, the Court squarely held that the reparation order issued by the Commission was "an 'order' subject to challenge under 28 U.S.C. (1946 ed.) § 41(28)," i.e., under the Urgent Deficiencies Act, 337 U.S. at 440-441.[4] See also *Pennsylvania Ry.* v. *United States,* 363 U.S. 202, 205. This view has since been applied to a Maritime Board order. *Piazza* v. *West Coast Line,* 210 F. 2d 947 (C.A. 2), certiorari denied, 348 U.S. 839.

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[4] The Court went on to hold that although the order was subject to review under the Urgent Deficiencies Act, a three-judge court, normally convened pursuant to that Act (see 28 U.S.C. 2325) would not be required to hear the case on remand. It so held because it concluded that a reparation order was not of the character which Congress had in mind when it provided the expedited appellate procedure which results from a hearing before a three-judge court. 337 U.S. at 442-443.

The pertinent legislative history of the Judicial Review Act of 1950 provides no basis for distinguishing between reparation orders and other types of orders. Indeed there is evidence, as Consolo himself concedes (Memorandum, p. 17), "that Maritime Board reparation orders were specifically included within the coverage of the [Judicial Review] Act." An earlier version of the Act, H.R. 2916, 81st Cong., 1st Sess., provided only that the several courts of appeals should have exclusive jurisdiction of "final orders of the [Board] entered under authority of sections 15, 17, 18, and 19 of the Shipping Act, 1916, as amended." All other orders of the Board were to "remain unaffected * * *." Hearings before Subcommittee 2 of the House Committee on the Judiciary on H.R. 2915 and H.R. 2916, 81st Cong., 1st Sess., p. 107. Spokesmen for the Board, while agreeing with the general purposes of the bill, recommended that H.R. 2916 be broadened. They stated (*id.*, p. 145):

> * * * the provisions of the bill should be sharpened so as to make clear that the new procedure shall apply to all reviewable orders of the regulatory agencies involved * * *.
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> * * * As it stands the bill would not apply to orders other than those issued under the specified sections of the Shipping Act, 1916, * * * and while the [Board] has not been able to make a statistical investigation to ascertain the number of orders issued under various sections of the acts administered by the [Board], it can be definitely stated that the largest number of important regulatory orders which the [Board] issues comes under section 22 of the Shipping Act, 1916. * * *

Section 22 of the Act (46 U.S.C. 821), it should be noted, is the complaint section of the Act pursuant to which Consolo instituted the administrative proceeding and is the section which authorizes the Board to make reparation orders. In keeping with the views it disclosed to Congress,

the Board offered an amendment providing for review in the courts of appeals of such final orders of the Board "as are subject to judicial review, pursuant to the provisions of section 31 of the Shipping Act, 1916 * * *." *Id.*, pp. 149-150. Explaining the proposed amendment, the Board's representatives stated (*id.*, p. 150):

> That provision [section 31 of the Shipping Act, 1916] is the one which brings the orders of the [Board] under the provisions of the Urgent Deficiencies Act.
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> This bill * * * makes those provisions applicable to reviewable orders under the Urgent Deficiencies Act.

The language ultimately adopted by Congress in the Judicial Review Act is virtually identical with that proposed by the Board. The legislative history thus fully confirms the intention of Congress to transfer to the court of appeals jurisdiction over all proceedings to modify or set aside final Board orders issued under the Shipping Act, including reparations orders issued under Secton 22 of that Act.

The reparation order here in issue involves "the same parties, the same disputes, the same claims for money damages, and the same statutes." *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 443. Yet under Consolo's view, as we have already noted, Consolo may challenge the order insofar as it denied him the full amount claimed only in this Court but Flota may challenge the order insofar as it allowed Consolo any amount only in the district court. Such a view is hardly in keeping with the Congressional objective in passing the Judicial Review Act which was to make for "simplicity and expedition" in reviewing the orders of the Board and other designated agencies. H. Rep. 2122, 81st Cong., 2d Sess. 4.

The dictum in *Brady* v. *Interstate Commerce Commission*, 43 F. 2d 847, 850 (N.D. W.Va.), aff'd *per curiam* 283 U.S. 804, cited by Consolo (Memorandum p. 14), that a reparation order is not "any order" within 28 U.S.C. § 41(28) (i.e., the Urgent Deficiencies Act) and therefore

"is not one which may be enjoined or set aside under title 28, § 41(28)," flies squarely in the face of the contrary holding in *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, discussed *supra*, and is no longer the law.

We agree with Consolo that Flota is entitled to but one review of the issues raised by its petition to review. But that is all Flota will get if the Board order in Consolo's favor is affirmed since, as was said in *In Re Federal Waters & Gas Corp.*, 188 F. 2d 100, 104 (C.A.D.C.), cert. denied sub nom. *Chenery Corp., et al.* v. *S.E.C., et al.*, 341 U.S. 953:

> "When an administrative agency exercises power of a quasi-judicial or adjudicatory nature and its order has been affirmed by the final judgment of the reviewing court, the rights and liabilities necessarily determined by the judgment of affirmance become res judicata. [citations omitted]"

Respectfully submitted,

James L. Pimper
General Counsel

Robert E. Mitchell
Assistant General Counsel
Division of Litigation

Thomas D. Wilcox
Attorney
Federal Maritime Board

Lee Loevinger
Assistant Attorney General
Antitrust Division

Richard A. Solomon
Attorney

Irwin A. Seibel
Attorney
Department of Justice

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